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CITATIONS

In the Supreme Court of the United States

No. 812

UNITED STATES OF AMERICA

Petitioner

vs.

PHELPS DODGE MERCANTILE COMPANY, a corporation,

Respondent

BRIEF OF RESPONDENT

SUMMARY

Food that is adulterated while held in original packages at its final destination in the warehouse of the consignee is not subject to condemnation under Section 304(a) of the Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1044, 21 U. S. C. A. 334(a), since such food is not adulterated "when introduced into or while in

interstate commerce" (1) within the meaning of the Act itself, or (2) within the meaning of Article 7, Section 8, Clause 3 of the United States Constitution upon which the Act depends for its validity.

ARGUMENT

(1)

The Circuit Court, in its opinion below, confined its decision to an interpretation of the specific language of the Federal Food, Drug, and Cosmetic Act. The opinion speaks for itself and both in its clarity and in the concise logic of its language, and in the ample citation of authority, covers the argument on this phase of the case much more thoroughly than respondent could do by long argument in this brief. For this reason respondent respectfully refers the Court to the opinion of Mathews, Circuit Judge, as fully supporting respondent in this proceeding.

(2)

Respondent, appellee in the Circuit Court, made the further point on the appeal from the District Court, that whatever Congress may have meant in drafting the Act, and whatever interpretation the administrative agency may have placed upon the Act, still an adulteration of food (whether in the original package or not) which has come to final

rest in the warehouse of a consignee within the boundaries of a State is not such occurrence or "incident" in "Commerce—among the several States" as comes within the Federal jurisdiction as limited by the Federal Constitution.

Before developing this argument, the respondent suggests that citation by petitoner of *McDermott v. Wisconsin,* 228 U. S. 115, 136, and argument by petitioner concerning the language of Section 10 of the Food and Drugs Act of 1906 should be considered by the Court as referring only to the auxiliary or enforcement powers of the administrative arm. It is clear from a reading of the case, and of the Section 10, that the Court, and Congress were giving to the administrative arm plenary and exclusive power only *to pursue* the offending food into the "intra state" sphere.

Thus where food, or drug, is mislabeled or adulterated—or, as in the case with *impure* anaesthetic ether, subject to progressive deterioration in and of itself—in the course of movement, actual or constructive, over state lines, then such food or drug is subject to search or seizure although it may at the time of such search or seizure have come to final rest in, (or under the 1938 Act, out), of the original package.

The present case does not involve such problem, however, and any reference to impairment of the agency's power to search or seize adulterated

foods or drugs is wholly beside the point. The question here is whether such foods or drugs, *once seized* must be shown to have been adulterated or misbranded while in "commerce—among the several States," and whether a showing that *the adulteration* took place after the food had come to final rest within the State, satisfies the constitutional limitation on the Federal powers.

Returning to the main issue, respondent admits that the marking out of the boundaries of Federal control by the Courts is an empiric process. There is a point after interstate transportation at which interstate commerce comes to an end.

This Court in *Higgins v. Carr Bros.,* 317 U. S. 572, 87 L. Ed. 468, has approved the statement of the Supreme Judicial Court of Maine, that "when the merchandise coming from without the State was unloaded at respondent's place of business its 'interstate commerce movement had ended.' "

This Court in *Federal Trade Commission v. Bunte Bros.,* 312 U. S. 349, 85 Law Ed. 881, and in *Polish Alliance v. N. L. R. B.,* 88 L. Ed. 1509, 322 U. S. 643, has specifically declared that there are still "local" intrastate activities which cannot, because they somehow "affect," "interrupt" or "promote" interstate commerce, be brought within the definition of "interstate commerce," in the absence of very specific Congressional definition.

It will be noted that in some cases under the Fair Labor Act, the warehouses to which delivery of goods was made, were merely "throats" of interstate commerce, through which the commerce continued (see *Stafford v. Wallace,* 258 U. S. 495), but respondent's warehouse was in no sense such "throat or sluice." It is therefore submitted that under the decisions of this Court construing the "commerce power," the adulteration of food resting finally in a consignee's warehouse is not within the Federal power.

Aside from the narrow "definition" approach, there is the broader question to be considered, whether the Court is willing by a "liberal" construction of the commerce clause to permit the agency to exercise unlimited powers as a means to arrive at the end of complete efficiency of sanitary control of food. The original reason for the limitation on Federal powers was that each State intended to keep its own sovereign powers as far as possible. The continuation of the limitation has been justified on the ground that each State should remain a laboratory in which independent experiments in legislation (or in lack of legislation) might be carried out without endangering the whole Federal fabric.

> "Congress is acutely aware of the existence and vitality of these state governments. It sometimes is moved to respect states rights and local institutions even when some degree

of efficiency of a Federal plan is thereby sacrificed."

"(the) insulated chambers of the states are still laboratories where many lessons in regulation may be learned by trial and error on a small scale without involving a whole national industry in every experiment." *Conn. L. & Power Co. v. Fed. Power Comm.,* 324 U. S. 531, 89 L. Ed. 1150.

The cry of states rights has fallen into disrepute since it has been so often used as a shield to shelter obvious wrongdoers, rather than as a sword to vindicate the use of state regulatory powers. In the present case the State of Arizona does not have a comprehensive, effective statutory means of regulating the storage of food. But there are States, and more particularly, municipalities, which have comprehensive and effective laws or ordinances which would be greatly impaired by any ruling that the Federal commerce power, exercised under the Federal Food and Drug Act, excluded operation of the local regulations covering *storage* of foods. The respondent has chosen a case arising in an area where local regulation is almost wholly undeveloped.

In the matter of the "empiric" process, the Court should draw the line in defining "interstate commerce" under the commerce clause in such manner that all of the power which is not capable of being exercised on one side of the line should

be recognized as existing on the other side, so that there may be no vacuum of anarchy. Clearly there is no "lack of capability" on the part of the State of Arizona, or the municipality within which the respondent's warehouse lies, to pass and enforce reasonable laws for the storage of foods which have come to final rest within their boundaries. In the zeal for centralization and efficiency, expediency has quite overshadowed the principle of federalism. If petitioner's contention is correct, then the great bulk of all packaged and canned foods in the State of Arizona is wholly within the Federal domain, since that State has no large food canneries or packagers within its borders and must get such foods through interstate transport. The hundreds of cans upon the shelves of the neighborhood grocer in the smallest Arizona community, the hundreds of bottles in the smallest drug store in the Arizona desert would all be subject to the exclusive control of the Federal bureau in all phases of storage, handling and sanitation if petitioner is correct. It is true that in the absence of *specific* Federal legislation Arizona might have concurrent power to legislate, but it is also true that in the *presence* of specific Federal legislation, the concurrent power of the State withers and dies. *McDermott v. Wisconsin,* 228 U. S. 115. Therefore Arizona, and its cities, and all States and cities in similar circumstance, would be wholly

without effective power to regulate food and drug *storage* facilities within their boundaries.

It is undoubtedly the opinion of the Food and Drug administration, in view of the inadequacies of many State laws, that this result is an end greatly to be desired. It is submitted by respondent that this end cannot be reached without doing violence to the provisions of the Federal Constitution, whether considered from the standpoint of previous judicial authority, or from the standpoint of empirical reasoning."

CONCLUSION

Respondent respectfully submits that petitioner's application for a writ of *certiorari* be denied, or in the alternative that the judgment of the Circuit Court herein be affirmed.

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